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WORKERS' COMPENSATION

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World Trade Center Tragedy Creates Complex Workers' Compensation Issues

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The World Trade Center tragedy will prove the greatest challenge that has yet confronted the U.S. workers' compensation system. Horrible and catastrophic events such as occurred on Sept. 11, 2001, were never contemplated in the legislative crafting of our nation's social, remedial insurance paradigm. Amid grief, sadness and despair, the injured workers and their dependents are being directed to file claims through this traditional administrative system, which has been enhanced by a complicated series of collateral and emergency entitlement

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programs. At a difficult time for all Americans, the road to benefits will be a twisted and byzantine labyrinth.

The scope of this disaster is staggering. Workers' compensation claims have been estimated in the range of \$1 billion to \$6 billion. The World Trade Center alone housed 50,000 employees and 430 businesses, including many premier financial tenants who were largely self-insured. The range of claims for both physical and mental disability will extend well beyond the physical bounds of the Twin Towers and pervade workplaces in numerous jurisdictions, both in the United States and around the globe.

The New York workers' compensation insurance market is shaped in large part by five major insurance carriers: American International Group, 13.59 percent market share; Liberty Mutual Insurance Company, 9.82 percent; Travelers/Citigroup Company, 8.31 percent; CNA Insurance Company, 8.24 percent; and Kemper Insurance Company, 6.96 percent. The financial stability of some of the insurance companies have come under scrutiny.

Kemper, one of the 20 largest property/casualty insurance groups in the United States and a leading provider of workers' compensation insurance, has already begun to experience these nega-

tive consequences. Fitch Inc.'s Insurance Group recently downgraded their financial strength rating for Kemper from A to A- and placed the company on a watch list for further rating downgrades that could result from a flood of Trade Center related claims.

Claimants will initially be confronted by jurisdictional issues. Many employers at the World Trade Center were multinational and/or multi-state corporations, and many employees were interstate commuters or foreign nationals. Many claims will raise dual-jurisdiction issues as claimants seek the maximum recovery available under the law. Most compensation acts base jurisdiction decisions on such factors as place of contract of hire, place of employment or the employer's place of business.

These factors have been liberally construed in favor of granting jurisdiction, as most states have a legitimate interest in the health, well-being and recovery of employees and a public policy to provide benefits to dependents.

The presumption of an employment relationship is sufficient for New Jersey law to apply, even if a contract of employment is not entered into in New Jersey. That presumption is not overcome even if the employee subsequently performs some work outside the state of New Jersey, and even if the injury occurs outside the state of New Jersey.

In *Phillips v. Oneida Motor Freight, Inc.*, 163 N.J. Super. 297 (App. Div. 1978), the employee resided in Pennsylvania, the original employment contract was entered into in

Pennsylvania and the accident occurred in New York. However, the injured worker either began or concluded each job in New Jersey, he slept in New Jersey during the work week, his equipment was in New Jersey and his paychecks were from New Jersey. The court concluded that the facts were sufficient to vest workers' compensation jurisdiction in New Jersey.

Generally, adequate contacts with the state are necessary to confer jurisdiction. Business executives who travel from state to state and are unable to establish a centralized or fixed employment situs are deemed to have insufficient contact, and the state will lack jurisdiction over the employee's claim. *Modern Workers Compensation* §104 (West Group) 2001.

Since the principal site of the terrorist activity was New York, it will obviously have jurisdiction. As a matter of constitutional law, a state has jurisdiction to award workers' compensation benefits to an employee injured within its geographical boundaries. However, this does not necessarily bar a dual-jurisdictional claim in another state. Where the employer and employee were Connecticut citizens and the injured worker sustained the accident in New York, the employee was permitted to receive compensation benefits under the Connecticut compensation act and the attorney was permitted to obtain fees under Connecticut law. See *Violette v. Armonk Assoc., L.P.*, 872 F. Supp. 1279 (1995, SD NY).

Many World Trade Center workers were employees of the Port Authority of New York & New Jersey. Although the Port Authority is an interstate compact agency, this fact alone does not confer dual jurisdiction in New Jersey as well as New York, since the site of the tragedy was in New York City. If an employee of the Port Authority worked at sites in New York, lived in New York and has not entered into a contract of employment in New Jersey, a workers' compensation claim cannot be asserted in New Jersey. See *Connolly v. Port Authority of New York and New Jersey*, 317 N.J. Super. 315 (App. Div. 1998).

Recognizing that employment relationships are becoming more geographically complex as a result of interstate and international relationships, the

courts have become increasingly challenged with problems of choice of law. Sometimes the courts have to go beyond the traditional tests (site of injury, site of contract or site of employment) to determine which forum's law should be applied. The courts have considered fairness to claimants in selecting an applicable law.

Two major considerations in New Jersey are the public policy demand that the injured employee be cared for adequately within the New Jersey and the

dependency benefits include a maximum dependency compensation rate of \$400 per week for the remainder of the dependent's life. The dependency benefit is apportioned between a spouse and minor dependents. If the spouse remarries, the benefits are terminated after two years. Minor dependents would continue to receive \$400 per week until age 18 (23 for a student attending school), except if the minor is disabled. New York also provides for a funeral allowance, which is \$6,000 for funerals

The federal government has enacted an alternative compensation program — the 'September 11th Victims Compensation Fund of 2001' — in lieu of the traditional remedies afforded by the civil justice system.

mandatory nature of workers' compensation in New Jersey. See *Wilson v. Faull*, 27 N.J. 105 (1958).

Most workers' compensation statutes include their own choice of law provision and cover out-of-state injuries. The traditional choice of law rules are not applicable since workers' compensation is neither tort nor contract. Even though a policy may have a multi-state endorsement, an employer may deny compensability in one jurisdiction but admit it in another.

In many instances, collateral source payments for medical expenses — that is, payments made by someone other than the workers' compensation carrier — become a significant reimbursement issue. If uncompensated rescue volunteers have been treated without charge, the workers' compensation carrier is not responsible for reimbursement. Under some state statutes, if an insurer other than the workers' compensation insurance carrier provides for payment, the collateral insurer is entitled to reimbursement. See N.J.S.A. 34:15-15.1 and N.Y. Workers Comp Law 13(d)(1).

Workers' compensation benefits vary from state to state. New York

in New York City or geographically adjacent areas. The N.Y. State Workers' Compensation Board has initiated procedures to expedite the disposition of these cases, including suspending the death certificate requirement for families seeking benefits.

New Jersey dependency benefits are computed based on a percentage of the deceased worker's wages. The rates commence at 50 percent of wages for one dependent and increase at the rate of 5 percent for each additional dependent to a maximum 70 percent of wages for five or more dependents. The maximum benefit is \$591 per week. On remarriage, the surviving spouse is entitled to receive the remainder of the compensation that would have been due had the remarriage not occurred or 100 times the amount of the weekly compensation paid immediately preceding the remarriage, whichever is less.

Dependents entitled to benefits for life include the surviving spouse (unless remarried), parents and stepparents. Additionally, dependency status is conferred on certain individuals under 18 years of age and over 40 years of age, full-time students to age 23 or physical-

ly or mentally impaired individuals. New Jersey provides for a maximum of \$3,500 for funeral expense reimbursement.

Additional remedies are available to public safety officers and rescue squad and ambulance crew members who died as the direct and proximate result of an injury sustained in the line of duty. See 42 U.S.C.A. § 3796. The Public Safety Officers' Benefits Act of 1976 authorized the Office of Justice Programs to provide these benefits and to assist the families of these public safety officers. The benefits are payable to the surviving spouse, children or parents of the officer and are not subject to state workers' compensation offset.

Recently enacted legislation provides for expedited payment of certain benefits in cases where death or catastrophic injury to public safety officers was connected with the terrorist attacks of Sept. 11, 2001. The legislation pro-

vides that "payment [is] to be made not later than 30 days after receipt of ...certification." PL 107-37 (HR 2882) Sept. 18, 2001, 115 Stat 219.

The federal government has enacted an alternative compensation program in lieu of the traditional civil remedies afforded by the civil justice system. The "September 11th Victims Compensation Fund of 2001" provides an alternative remedy for those who elect an administrative procedure for benefits and opt out of the standard aviation law tort remedy that would afford a trial by jury and the potential recovery of punitive damages. See PL 107-42, Sept. 22, 2001, Slip Copy.

The program provides for compensation to any individual (or relative of a deceased individual) physically injured or killed as a result of the terrorist-related aircraft crashes of Sept. 11, 2001. The U.S. Attorney General will appoint a Special Master,

who will administer the program and promulgate all procedural and substantive rules governing the payment of benefits.

Myriad unanswered and multifaceted questions exist concerning the federal program, including questions involving collateral source payments — state workers' compensation benefits. Aviation law experts will intensely debate whether injured workers and their dependents should seek additional benefits under this program.

Many attorneys will understandably look with little favor on abandoning the option of trial by jury. Another disadvantage is the lack of provision for punitive damages in light of repeated and documented failures of airline security systems. The apparently international nature of the terrorist network responsible for the tragic events is likely to raise additional complex issues of national and international law. ■